

ESTTA Tracking number: **ESTTA254906**

Filing date: **12/15/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91176744
Party	Plaintiff DC Comics and Marvel Characters, Inc.
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Date	12/15/2008
Attachments	Opposer's reply brief SUPER HERO.pdf (4 pages)(61489 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

DC COMICS and
MARVEL CHARACTERS, INC.,

Opposers,

v.

MICHAEL CRAIG SILVER,

Applicant.

Opposition No. 91/176,744
Application No. 78/823,155
Mark: SUPER HERO

**OPPOSER'S REPLY BRIEF IN SUPPORT OF OPPOSER'S MOTION FOR LEAVE TO
AMEND ITS NOTICE OF OPPOSITION**

Opposers DC Comics and Marvel Characters, Inc. (collectively, "Opposer") respectfully submit this Reply Brief in Support of Opposer's Motion for Leave to Amend its Notice of Opposition. Opposer addresses the following issues raised in Applicant's Brief and Response to Opposer's Motion for Leave to Amend its Notice of Opposition:

I. APPLICANT'S LATE-SUPPLIED DOCUMENT IS IRRELEVANT AND FAILS TO ESTABLISH A BONA FIDE INTENTION TO USE THE SUBJECT MARK.

In Applicant's Brief and Response to Opposer's Motion, Applicant provided a single document which he asserted was evidence of his *bona-fide* intention to use the SUPER HERO mark for the products listed in his Application. However, this document does not even relate to the SUPER HERO mark. Instead, Applicant's document references a completely unrelated trademark, namely, "MAIDEN WAVES." Thus, this document is wholly irrelevant to the

instant proceeding. Furthermore, Applicant concedes that he neglected to produce this document, “based on the fact that this document was created for use with a different trademark,” and that, “such document was not relevant.” Thus, Applicant has not provided a single document which evidences his *bona fide* intention to use the SUPER HERO mark in connection with the subject goods. Applicant’s failure to come forward with any relevant documentary evidence regarding his intent to use the subject mark at the time of filing, is sufficient to prove that Applicant lacked a *bona fide* intention to use this mark in commerce, as required by Section 1(b) of the Trademark Act, 15 U.S.C. 1051(b). *See, Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503, 1507 (T.T.A.B. 1993). Therefore, Opposer should be granted leave to amend its Notice of Opposition to include this additional valid basis.

II. OPPOSER’S MOTION WAS PROPERLY SERVED UPON APPLICANT.

Pursuant to 37 CFR § 2.119, Opposer properly served its Motion papers upon Applicant by mailing these papers on October 31, 2008, via first class mail, to Applicant’s last address on record in the Opposition proceeding, namely, 3229 Steiner Street, San Francisco, California 94123. Applicant filed two “Change of Correspondence Request” forms in the instant proceeding, the most recent being on March 20, 2008, in which the aforementioned address was provided. Despite Applicant’s contention that he acted to “notify Opposers” of the most recent address change, namely, “64 Lincoln Dr., Sausalito, CA 94965,” no such effort (to Opposer’s best knowledge) was ever made. Opposer never received notice from Applicant of the Sausalito address, therefore Opposer legitimately relied on Applicant’s most recent address on record in the instant proceeding, and Opposer’s Motion for Leave to Amend its Notice of Opposition was properly served on Applicant.

III. OPPOSER'S MOTION WAS LATE FILED.


Pursuant to 37 CFR § 2.119 and TBMP 503.02(b), Applicant's response to Opposer's Motion was due on or before November 20, 2008. However, Applicant filed his Brief on November 25, 2008, five days after the Board deadline. While Opposer concedes that it has not suffered any prejudice from the delay, Opposer notes that the rules set forth in Part Two of Title 37 of the Trademark Code, namely § 2.127, requires parties to meet certain Board deadlines for responses to Motions, and the Board is justified in enforcing such deadlines. *See generally, Hewlett-Packard v. Olympus*, 18 USPQ2d 1710 (Fed. Cir. 1991).

CONCLUSION

For the reasons hereinabove set forth, Opposer respectfully requests that the Board issue an Order granting Opposer's Motion for Leave to Amend its Notice of Opposition.

KENYON & KENYON LLP


Dated: December 15, 2008

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PROOF OF SERVICE

I hereby certify that a true and complete copy of OPPOSER'S REPLY IN SUPPORT OF OPPOSER'S MOTION TO LEAVE TO AMEND ITS NOTICE OF OPPOSITION, has been served by mailing said copy on December 15, 2008, via first class mail, to:

Michael Craig Silver
64 Lincoln Drive
Sausalito, CA 94965

A handwritten signature in cursive script, reading "Michelle C. Morris".

Michelle C. Morris